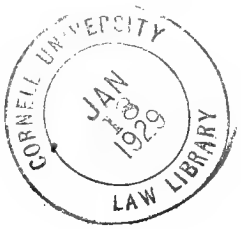

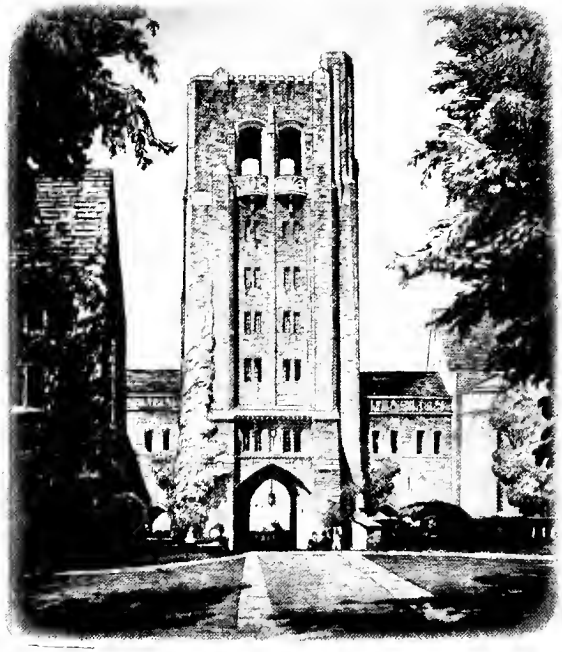

INTRODUCTION TO THE STUDY OF LAW

BY

ROSCOE POUND

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INTRODUCTION TO STUDY OF LAW

CHAPTER I

FUNDAMENTAL CONCEPTIONS

§ 1. The Science of Law. The science of law, that is, that organized body of knowledge that has to do with the administration of justice by public or regular tribunals in accordance with principles or rules of general character and more or less uniform application, is usually called "jurisprudence." But that term has also other senses. In the civil law, that is, modern Roman law, it is used to mean the course of decision in the courts. Hence, through French influence, it has become more or less common to use this term to mean the general course of decision in a particular court or in a particular jurisdiction. This has given us "equity jurisprudence" for the substantive rules and principles applied by courts of equity, a name which Story's classical work has established in good usage. By a natural transition in a country where the law is chiefly in the form of judicial decisions, the term has come to be used also as a polysyllabic synonym for law. But this use of the word is not to be commended. "Medical jurisprudence" for legal and forensic applications of medicine and "dental jurisprudence" for the law relating to dentists are not good usage.

Jurisprudence, then, is the science of law, and hence, as law is a means toward the administration of justice, the science of justice. But justice does not, of necessity, re-

quire law. It may be administered either according to the will of the individual who administers it for the time being or according to law. Oriental justice and martial law, so-called, which means simply the will of the military commander for the time being, afford examples of the former. The administration of justice according to law means administration according to some standard, more or less fixed, which individuals may ascertain in advance of controversy and by which all are reasonably certain of receiving like treatment. No system fully realizes this idea. Even in the most matured systems, causes arise constantly for which the rule must be made or ascertained after the event. But this is a necessary evil arising from the infinite variety of human actions and the constant changes to which all things are subject. Under an oriental régime one must take many chances in believing that his ideas of justice will agree with those for the time being of the judge or magistrate when he passes upon the matter; one cannot with safety do anything involving large expenditure of labor or money or extending over a long time. With increasing complexity of affairs, the bad effects of such lack of rule in the administration of justice are more acute. Civilization increases this complexity, and so demands law, that is, rule and order in the administration of justice, so that men may act assuredly with reference to the future. One essential of law, then, is uniformity. Experience has shown abundantly that this is attainable only by measuring situations and relations, as they become the subjects of controversy, by reason. To a certain extent, the will of society as to the relations of individuals with each other may be ascertained and declared in advance. But, as a rule, this is possible only along general lines. Hence, for the great mass of causes, uniformity and certainty are to be reached in no other way than by requiring the magistrate to bring a trained reason to bear upon them. The idea with which we meet sometimes, that courts should administer the will of the people for the time being in each case, is as un-legal and opposed to justice as the corresponding seventeenth-

century notion that in every case they ought to administer the will of the king for the time being. If left to act freely in individual cases, without rule or standard, no will, either of king or of people, is sufficiently set and constant to insure a uniform administration of justice. Law and caprice are incompatible.

A modern community not only requires law, but it requires a great deal of law. In a crowded world, compromises between the activities of each and the activities of his fellows are necessary at many points. Increase in the possibilities of human action as well as increase in the number of those who may act demands increased limitations upon each individual in the interest of free action by other individuals; and yet such limitations in reality increase the possibilities of effective individual action by making division of labor possible. Division of labor cannot exist without restraints on the liberty of each in the interest of the like liberties of all. But these limitations, to achieve their purpose, must be regulated definitely, and, as we have seen, that means for practical purposes that they must be regulated by reason. In other words, they require law. They require that certainty in definition and application involved in the administration of justice according to law. Accordingly, the whole course of development of society has shown a movement away from justice without law and toward the working out of a scientific and complete body of rules for the administration of justice.

A developed system of law may be looked at in five different ways:

(1) It may be examined or expounded dogmatically, that is, one may confine himself to ascertainment and exposition of the actual rules of which it is made up or of the principles by which those who are governed by it actually administer justice.

(2) It may be considered historically, that is, the student may investigate the historical origin and development of the system and of its institutions and doctrines.

(3) It may be examined analytically, that is, its structure,

subject-matter, and doctrines may be studied with a view of reaching general underlying principles of legal reasoning and of testing individual rules and doctrines by such examination and by comparison with principles underlying other systems.

(4) It may be studied philosophically, that is, with respect to the ethical and the philosophical bases of law and of particular legal institutions and doctrines.

(5) Finally, there remains the critical method, that is, consideration of what its rules ought to be in the light of history, analysis, philosophy, and the practical needs of the community.

It will be perceived that the first is not a scientific method, though it may be pursued historically or analytically or both, so as to become scientific, and dogmatic exposition usually pursues one or both of those lines to greater or less extent. On the other hand, the four remaining are scientific methods and are called the methods of jurisprudence. Those who pursue them are spoken of as historical, analytical, or philosophical jurists, as the case may be. Speaking generally, American jurists have been for the most part historical, English jurists analytical, and the jurists of continental Europe philosophical. In recent years a new method of jurisprudence has arisen and in consequence, a new school of jurists, which we may call the sociological school. Jurists of this school study law as a social mechanism and examine particular institutions and doctrines with reference to the social ends for which they exist and which they serve.

§ 2. Justice. As the object of law is the administration of justice, our first question must be, what is justice. We have to do here, on the one hand, with the philosophical or ethical theory of justice; to ask, what is ultimate, ideal justice. On the other hand, we have to do with the legal conception of justice; to ask, what is proximate justice, what is the practical approximation to ideal justice, what is it that courts endeavor to administer in applying the rules of law.

As a virtue, justice is that "tendency of the will and mode of conduct which refrains from disturbing the lives and interests of others, and, as far as possible, hinders such interference on the part of others". (Paulsen). The interests of another, which one ought to refrain from disturbing, are: his body and life, his family, his property, his honor, and his freedom, that is, the possibility of his shaping his life as an end in itself. Corresponding to these interests are duties of not infringing them and rights that they be not infringed. Infringement of these interests, violation of these rights, is injustice. Regard for these interests, performance of these duties of not infringing them, is called right. Hence the ethical formula of justice is: respect and protect the right. The practical aim of judicial administration of justice is such adjustment of the relations of individuals with each other and with the state or society as is approved by the moral sentiment of the community. The law aims to administer ultimate justice, so far as legal machinery may do so and so far as the community at large apprehend it. But legal principles and rules develop more slowly than ideas of justice. The law is necessarily behind the ideas of the most advanced portion of the community, and the divergence between law and current ideas of justice may at times become acute. In such event, the rules which the state lays down, which, therefore, the courts must recognize and apply, are the law, whether the state does wisely in laying them down or not. As Hobbes puts it, "authority not truth makes the law". When the state has not spoken authoritatively, however, truth and reason must be guides, and the proposition that authority makes the law means in reality that we look to the moral judgment of the community, as expressed through the state, and not to the private judgment of the citizen.

On many matters with which the law has to deal, the moral judgment of the community is not expressed or is not agreed or is indifferent. Hence, jurists must have some general theory of justice by which to be guided. For a

long time, the idea which has controlled in the legal theory of justice has been to insure the greatest possible freedom of individual self-assertion. This idea was expressed by the philosopher, Immanuel Kant, thus: "Every action is right which in itself or in the maxim on which it proceeds, is such that it can coexist along with the freedom of the will of each and all in action, according to a universal law". That is, justice consists in bringing the actions of each into harmony with the actions of all by a rule of general application, instead of by an arbitrary act. Accordingly, Spencer defined justice as, "the liberty of each limited only by the like liberties of all". Until very recent times, this theory has shaped legal rules. On the one hand, there was and had to be external restraint and coercion. On the other hand, the spirit of the time was democratic, so that it was necessary to find some basis for restraint and coercion other than mere authority, and the individual demanded wide freedom of thought and of action. These two ideas, external restraint and individual freedom of action, were reconciled by insisting as a fundamental upon only so much restraint as is necessary to preserve and secure individual freedom of action, or, putting it conversely, complete freedom of action except so far as restraint is needed to insure the harmonious coexistence of the individual with the whole.

American constitutional provisions and bills of rights, intended to guarantee individual liberty, are framed upon this theory, and it has entered into most of our legal doctrines. Recently, however, the rise of collectivism has occasioned radically different theories of justice. For instance, some regard justice as that which is ultimately for the best interest of all when applied as a standard for the actions of each. This is called a social-utilitarian theory. Even more recently, the prevailing theory of legal justice has been opposed with what is called social justice. The latter is thus defined by Ward: "Justice means the satisfaction of everyone's wants so far as they are not outweighed by others' wants". Much legislation and even

some judicial decision shows the influence of this newest theory.

It may be well to note why it is that external adjustment of the relations of individuals with each other and with society is necessary. Knowledge of what is right does not insure the doing of what is right. Moreover, all men are not agreed upon what is right. Whatever we take as the meaning of "right", whether we consider it a divinely-imposed standard, a standard implanted in each man's conscience, conformity to the requirements of the ultimate welfare of all, or conformity to the evolved moral sense of mankind, men are not strong enough to conform to the standard unvaryingly. In consequence, compulsion must be added to instruction, and we find, accordingly, regulative or coercive systems for maintaining right by some instrument of external control. These systems are three: religion, as a system, acting upon the human will by motives drawn from the supernatural; public opinion, acting through the force of public approval or disapproval; law, the administration of justice by the state, acting through the application of physical force. Law, therefore, is but a means toward justice, which is the end. As Paulsen puts it, law is "a mechanism in the service of the good".[1]

§ 3. Law. We must distinguish three common uses of the term *law*. These are: (1) "law" as used in the natural and physical sciences; (2) "natural law" or "law of nature", as the term has been used by writers on the philosophy of law; (3) "law" in the juridical sense. In the sciences, law is used to mean deductions from human experience of the course of events. Thus, the "law of gravitation" is a record of human observation and experience of the manner in which bodies which are free to move, do in fact move toward one another. By "natural law" or "the law of nature", writers upon legal subjects mean the principles

[1] On the subject of this section, the diligent student may read with profit: Paulsen's Ethics (Thilly's translation) 627-633; Spencer, Justice, chs. 5, 6; Pollock, First Book of Jurisprudence 28-39; Salmond, Jurisprudence, §§ 6, 7, 9-10, 18-20, 26-29.

given community which exercises its function of law-making. But when the sovereign establishes rules it also undertakes to make them effective, and this is brought about in the case of legal rules (1) by punishment of those who violate the rules; (2) by interference in advance to prevent disobedience; and (3) by reinstatement of affairs or of the parties to the position in which they were before disobedience or to that in which they would have been but for disobedience. This characteristic of law is called "sanction". In our Anglo-American legal system, the first of these three types of sanction is appropriated exclusively to criminal law. The second is resorted to only exceptionally: in criminal law by binding over one who threatens another with injury to keep the peace; on the civil side of the law by injunction. The third may take the form of compelling the wrongdoer to redress the injury specifically — that is, to do specifically what he wrongfully left undone (for instance, to convey land which he contracted to sell and now refuses to transfer) or to undo what he has done wrongfully (mandatory injunction). This form is appropriated exclusively to courts of equity except in the case of duties of public officers, which are enforced specifically by courts of law by the writ of *mandamus*.[2] Or instead of specific redress, this third type of sanction may take the form of a substituted equivalent for the injury in the form of money damages. This is the ordinary remedy of our legal system and is the normal form of reparation administered by our courts of law.

While historically laws have existed without sanction and perhaps a great body of law exists today without it, in the case of international law, sanction has come to be an indispensable feature of law in modern society. Without sanction, the rules established by the state would be mere recommendations or exhortations addressed to the citizen as to the course of conduct the state *wishes* him to follow. With sanction added, they become commands enjoining the course of conduct the state *requires* him to follow. When the sanc-

[2] See Article on "Extraordinary Legal Remedies".

tion is feeble or ineffective, we get so-called "dead-letter laws", laws in name only, of which unhappily recent law-making affords too many examples. The history of laws and institutions is full of illustrations of the function of sanctions in giving rules character as laws. Thus, under the Confederation, the Congress of the United States had no power to enforce its acts and resolves. Hence, they were not regarded by the States and were nugatory although the States had delegated to Congress the power to make them. In the same way there are many constitutional understandings or customs, generally observed, which have no sanction and are not laws. For example, there is a well-settled constitutional custom that the president of the United States shall not be re-elected twice. Yet if he were so re-elected there would be no legal mode of displacing him or of preventing him from taking office. On the other hand there is a rule of constitutional law that the president must be a native-born citizen. This rule has sanction behind it and could be given effect by legal means.[3]

§ 4. **Law and Morals.** In a theoretically fully developed system of law in which judicial and legislative powers were fully separated, it would be easy to distinguish the relative province of law and of morals. In such a system law would be for the courts, morals for the legislature. But in so far as this separation is incomplete, and because practically it cannot be made complete, in the field in which judges must determine as well as administer the law, questions of morals must be gone into by the courts much as the legislator would have to go into them under like circumstances. There are, accordingly, three points of contact between law and morals, where the courts look primarily to general principles of right and justice for guidance. These are: (1) discretion; (2) judicial legislation; and (3) interpretation. Discretion is the power committed to courts to apply the personal

[3] On the subject of this section, reference may be made to Gray, The Nature and Sources of Law; Korkunov, General Theory of Law (translated by Hastings); Holland, Jurisprudence, chs. 2, 3; Salmond, Jurisprudence, §§ 5, 16, 17.

judgment of the judge to certain cases to which no rule is applicable or to which rules cannot be made to apply, from the nature of the cases themselves, so that the law leaves them to the sound sense and conscience of the magistrate. The law is jealous of reposing any wide discretion or discretion with respect to any considerable range of subjects, since the very purpose of law is to eliminate the personal element in the administration of justice, whereas discretion is essentially personal. Hence discretion is usually confined within narrow limits. Whether a matter is one for law or one for discretion is settled by the law; the court has no power to put it in the one category or the other at pleasure. A court has no discretion to apply the law or not, as it sees fit. Moreover, where discretion is conferred, it must be really exercised as such; the court may not act oppressively or arbitrarily under pretense of exercising discretion. Such arbitrary or oppressive action under color of exercising discretion is called abuse of discretion. If discretion reposed in a court or judge is in fact exercised as such, the manner of its exercise will not be reviewed. But if the discretion is abused, the abuse may be reviewed and corrected by a higher tribunal.

In its proper sense, the term judicial legislation or judicial law-making is used by jurists to refer to decisions by judges of cases of a novel character, not governed or imperfectly governed by existing rules of law, whereby new rules of law arise. In part it is required by the impossibility of foreseeing the infinite variety of causes upon which courts must pass and of establishing principles for their determination in advance. In large part, however, it is a survival from times when there was little or no legislation and when legislative and judicial functions were confused and undifferentiated. Consequently its scope and importance in our legal system are diminishing continually. Like judicial discretion, this power is not arbitrary and unrestricted but must be exercised along well-settled lines. The chief agent in judicial law-making is analogy and the process today consists in choosing between competing analogies

of existing rules and selecting and developing that which appears most in harmony with the rest of the legal system and most consonant with reason and justice. Interpretation is the determination of the meaning of a rule and its application to a concrete case. The object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention with which the law-maker made the rule or the sense which he attached to the words in which the rule is expressed. Employed for these purposes, interpretation is purely judicial in character. But the ordinary means of interpretation, namely, the literal meaning of the words used and the context, often fail to lead to a satisfactory result. In that case, after vainly trying these primary indices to the meaning and intent of the law-maker, we must have recourse to the reason and spirit of the rule or to the intrinsic merit of the several possible interpretations. Here the line between a genuine ascertaining of the meaning of the law and making over of the law under guise of interpretation becomes more difficult. Strictly, both are means of genuine interpretation. They are not covers for the making of new law. They are modes of arriving at the real intent of the maker of existing law. The former means of interpretation tries to find out directly what the law-maker meant by assuming his position in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy. The latter, if the former fails to yield sufficient light, seeks to reach the intent of the law-maker indirectly. It assumes that the law-maker thought as we do on general questions of morals and policy and fair dealing. Hence it assumes that of several possible interpretations the one which appeals most to our sense of right and justice is most likely to give the meaning of those who framed the rule. If resorted to in the first instance, or without regard to the other means of interpretation, this could not be regarded as a means of genuine interpretation. But inherent difficulties of expression and want of care in

drafting require continual resort to this means of interpretation for the legitimate purpose of ascertaining what the law-maker in fact meant. Moreover, it happens frequently that the law-maker did not foresee or consider a question that subsequently becomes important. In such case, there is no rule at hand and the court must make one by developing the materials which the law affords it. This process of meeting deficiencies or excesses in rules imperfectly conceived or enacted is called spurious interpretation. It is a form of judicial law-making required by the same conditions and justified by the same necessities as the judicial law-making already considered. In these cases in which, in default of existing rules, judges are compelled to make rules as well as to administer them, morality, under one name or another, must stand for the law which should in theory, but does not in fact, exist as the rule of decision.

A notion that there is an appeal from legislation to common right and reason or to "natural law" and that even courts are bound to give effect to the latter as against positive law in conflict therewith, formerly had no little vogue in the books and still reappears in occasional *dicta* in the decisions, sometimes as an absolute dogma, sometimes in its true place of a rule of interpretation. In practice we may admit two propositions only. (1) As between a man and his conscience he may under some circumstances be justified morally in disobeying a law. That is, he may appeal to his reason and conscience for internal justification. But the courts will not and ought not to admit this as a legal justification, for it is not the individual conscience but the collective conscience as reflected in the law which the courts must regard. (2) When the court is called on to interpret a doubtful rule or to supply a rule for a situation for which no provision is made, it may and should regard the dictates of common right and reason. In interpreting or supplying rules of law, truth and reason are to be followed; in applying rules which already exist, authority must govern. This was expressed by Hobbes in the maxim already referred to: "Authority, not truth, makes the law".

It is important also to perceive the distinction between law and morals in respect of application and subject matter. Ethics, the science of morals, aims at perfecting the individual character of men. Law aims at regulating the external relations of men to each other and to the commonwealth. Accordingly, morality looks to thought and feeling primarily rather than to acts. Law looks to acts and only to thoughts and feelings so far as is necessary to explain and give character to acts. Again, moral principles are of individual and relative application; they must be tested and described by the circumstances which surround their application. Attempts to turn moral principles into logical propositions are futile since they leave out of account the individual and the environment. Legal rules, on the other hand, are of general and absolute application. So far as foresight extends they are and ought to be reduced to logical propositions. Accordingly, law must act in gross, and hence to a greater or less extent in the rough, exacting, for example, the same penalty from persons of an indefinite number of shades of moral guilt. And because it must act in this way many things which are morally reprehensible are practically out of reach of the law. Law, therefore, does not necessarily approve what it does not condemn. Finally, law is required to deal with many things which are morally indifferent. Often the law might prescribe either of two alternate courses of action with equal justice, but must choose one that there may be certainty. Sometimes also the public interest demands imposition of legal liability without regard to moral fault, as in the case of liability of masters for acts of their servants. Finally, in many cases the legal difficulty arises from the fact that the parties are equally blameless and yet loss must fall on one of them. The principles of morals are inadequate to furnish a settled rule for such cases. Each judge might have his own notion. But the moment, to avoid this purely personal element, we make a rule to fit such a case, a legal rule comes into existence which is not a moral rule. Thus law, as it develops, is compelled to take on an artificial and scientific character.

From this artificial character of legal rules, it results that law must always operate more or less mechanically. And this necessary mechanical operation of legal rules is the most important and most constant cause of popular dissatisfaction with administration of justice according to law. It is a penalty of uniformity. In legal history we find a constant movement back and forth from wide judicial discretion to strict confinement of the magistrate by minute and detailed rules. At times more or less reversion to justice without law becomes necessary in order to bring the public administration of justice into touch with changed moral, social, or political conditions. But in the end such periods of reversion result only in new rules or changed rules; the new element in time becomes as rigid and mechanical as the old, for mechanical operation of law may be minimized; it cannot be obviated. The process of making general rules involves elimination of the immaterial elements of particular controversies. If all controversies were alike or if the degree in which actual controversies approximate to the recognized types could be calculated with precision, this would not matter. The difficulty is that in practice they approximate to these types in infinite gradations. When we eliminate immaterial factors to reach a general rule, we can never entirely avoid eliminating factors which will be more or less material in some particular controversy. If to meet this inherent difficulty in administering justice according to law we introduce a judicial dispensing power, the result is uncertainty and an intolerable scope for the personal equation of the magistrate. If we turn to the other extreme and pile up exceptions and qualifications and provisos, the legal system becomes cumbrous and unworkable. Hence the law has always ended in a compromise, in a middle course between wide discretion and over-minute legislation. In reaching this middle ground, some sacrifice of flexibility of application to particular cases is inevitable. In consequence, the adjustment of the relations of man and man according to these rules will of necessity appear more or less arbitrary and more or less in conflict with the ethical

notions of individuals. In periods of absolute or generally received moral systems, the contrast between legal results and strict ethical requirements will appeal only to individuals. In periods of free individual thought in morals and ethics, and especially in an age of social and industrial transition, this contrast is greatly intensified and appeals to large classes of society. It is impossible that legal and ethical ideas should be in entire accord in such a time. The individual looks at cases one by one and measures them by his individual sense of right and wrong. The lawyer must look at cases in gross, and must measure them largely by an artificial standard. He must apply the ethics of the community, not his own. If discretion is given him, his view will be that of the class from which he comes. If his hands are tied by law, he must apply the ethics of the past as formulated in common law and legislation. In either event judicial and individual ethical standards will diverge. And this divergence between the ethical and the legal, as each individual sees it, gives rise to the misunderstanding of courts and distrust of law which may be found in all times and among all peoples.[4]

§ 5. **The Scope and Subject-Matter of Law.** The scope of a legal system may be defined negatively and positively. We have seen that law embraces rules determining or governing five kinds of relations: relations of individuals with each other; relations of individuals with the state; relations of individuals with other states; the organization and functions of the state; and the relations of states with each other. But law, as lawyers use the term, embraces only the rules upon these subjects which are recognized or enforced by the tribunals of the state. Hence all of the rules upon these five classes of subjects which obtain in the world are not laws, and how far they may be made laws depends upon how far they are capable of judicial application to the decision

[4] The student who desires to pursue this subject further may be referred to Amos, Science of Law, ch. 3; Gareis, Science of Law (translated by Kocourek) § 6.

of controversies. The limits of practicable judicial action are the practical limits of the law.

Looking at the matter positively, as the object of law is the administration of justice, law should be as broad as justice, so far as the exigencies of administration will permit. Justice requires a harmonizing or a balancing of many conflicting interests so as to permit the fullest development and exercise of human powers and capacities with the least injury to the several interests. In general, the interests which a legal system ought thus to harmonize or balance are social, public, and private. Social interests are maintained chiefly and until very recent times almost entirely by the criminal law. Public interests are maintained in the Anglo-American legal system primarily by private actions given to the state or to public officers on behalf of the state, on the analogy of private rights, by private actions allowed to individuals, by the so-called prerogative writs, such as *mandamus* and *quo warranto,* and by the criminal law. Private interests are maintained by rights, powers, and privileges conferred upon individuals and vindicated by private actions in the courts. Rightly or wrongly, our Anglo-American legal system is intensely individualist. It conceives that a paramount public and social interest is in the securing to each individual his private rights, that is, those capacities of action and powers of influencing others through the force of the state which are requisite to secure and protect certain spheres of interest upon which his individual activities depend or about which they center. These are: (1) Body and life. This is the first interest, historically, to receive the protection of law, and the resulting rules make up the bulk of primitive legal systems. Probably it is more completely capable of legal protection than any other interest. But even here law cannot cover the whole field. Only palpable and serious injuries may be dealt with judicially. Many injuries in the way of annoyance, irritating sensitive nerves by acting upon the mind only, shocking delicate sensibilities, causing grief,

or arousing anger, may affect the body or even life and yet may be too trivial or too subtle to be reached by law.

(2) The family, or, as it has been called, the expanded individual life. Here, until recently, individual interests have been regarded almost exclusively. In recent times, social interests have been regarded as paramount. In consequence the rules of law upon this subject are in a state of transition. Here also the law is by no means able to cover the whole field even of protecting individual interests. For example, the more tangible, the grosser encroachments upon the peace and unity of the household, such as abduction, seduction, and adultery, may be reached by the courts. But more subtle injuries such as tale-bearing, intrigue, and the like, until or unless they result in the former or in an actual breaking up of the family relation, cannot be dealt with.

(3) Property, the means of existence. Perhaps here the law is more thoroughly effective today than at any other point. Yet in modern times many subtle modes of acquiring property at the expense of others are taxing the skill of the courts and the ingenuity of legislatures, as, for example, in determining how far competition is to be required or to be protected, how far competition may extend, what methods may be employed therein and what "business methods" are to be sanctioned and what to be condemned.

(4) Honor or reputation, the social existence. This interest is encroached upon chiefly by defamation, that is, slander and libel. Older systems of law recognize insult as a serious encroachment upon this interest, to be dealt with legally. But in modern communities insult, of itself, is more likely to injure the aggressor than the object of the wrong. Hence, affronts of themselves without more are seldom considered by the law. Here, again, law can reach only the more flagrant and careless, not the more subtle and shrewd, but often no less dangerous infringements of the interest it seeks to protect.

(5) The free exercise of volition. This is the most difficult subject with which the law has to deal. Primitive law

makes no attempt to protect such an interest. But developed law recognizes pressure applied to the will without any interference with the physical person, circumvention of the will through fraud and deceit, overreaching through abuse of confidential relations and undue influence thereby exerted upon the confiding or the weak-minded, and arbitrary or unreasonable interference with the power of the individual to make such contracts and obtain such legal rights and incur such legal duties as seem best to him, as violating an interest of quite as much importance as any of the foregoing.

(6) The spiritual life, the holding of opinions as to morals, religion, politics, etc. This interest is infringed by intolerance. But beyond restraining public establishment of religion and public enforcement of outward conformity to this or that belief, law may do very little in this connection. Many most cruel forms of intolerance through purely social pressure upon the individual cannot be reached legally. Moreover, there is often a strong social or public interest to be balanced against this private interest, as, for example, in the case of anarchistic opinions, which makes the subject more than usually difficult for the law-maker to deal with effectively.[5]

§ 6. **Rights.** The law maintains and protects the foregoing interests by recognizing or creating certain duties, rights, powers, and privileges. Duties may be moral or legal. A moral duty exists where one is bound to do or not to do something because of some interest, social, public, or private, recognized by the moral sentiment of the community. A legal duty exists where one is bound to do or not to do something because of some interest, social, public, or private, which the law undertakes to maintain through the power of the state invoked in judicial proceedings. For the most part legal duties are correlative to legal rights, public or private. But there are many absolute du-

[5] In this connection reference may be made to Austin, Jurisprudence, Lec. 2; Spencer, Justice, chs. 9-18; Markby, Elements of Law, §§ 48-59; Salmond, Jurisprudence, § 30.

ties, that is, duties imposed for the maintenance of purely social interests without regard to any corresponding public or private right. These absolute duties are enforced by the criminal law. The chief means which the law adopts, however, in order to attain its end, is the recognition or definition of certain capacities in persons of influencing the actions of others. The courts give effect to these capacities of influence by protecting those in whom they reside in the exercise of them, or by enforcing them against those against whom they are conferred, or by vindicating them by some form of redress when they are interfered with. These capacities of influence are called rights. If the capacity which one has of influencing the acts of others because of some interest which requires others to act or not to act in a particular way, has behind it simply the moral sentiment of the community, we speak of it as a moral right. When such capacity is recognized or created by law and the power of the state may be invoked through the courts in order to give effect to it, we speak of it as a legal right. When we think that such a capacity ought to exist and ought to be recognized and made effective by law, we speak of a "natural" right.

Corresponding to every right there is a duty, moral or legal, according as the right is moral or legal. The person to whom the capacity of influencing others for the security of some interest is given, or in whom it is recognized, has a right; the person or persons upon whom that influence may be exerted have duties. A power is a capacity conferred or recognized by law of creating, divesting, or altering rights and so creating or altering duties. It may be conferred by the law directly or indirectly through recognizing a power conferred by one person upon another. Thus, an agent has a power of binding his principal by acts within the apparent scope of his authority, that is, of creating rights in others against his principal and corresponding duties in the principal, which is conferred upon all agents by law. But he has also a power of binding the principal by acts within the scope of the authority given

by the principal which the law confers indirectly, by recognizing such capacities in agents when principals have entrusted them therewith.

A privilege is an immunity from liability for what, but for the privilege, would be a violation of duty. Privileges may be created directly by the law because of some social or public interest which may be maintained best by exemption of certain persons or certain classes of acts or acts on certain occasions from the operation of general rules of law. For example, what would ordinarily be actionable as a libel because of its effect upon the reputation of the subject of the writing, may be privileged and hence involve no liability when written in criticism of the official acts of a public officer, since the public interest in free criticism in such cases requires a deviation from the general rule. Privileges may be conferred also by individuals whose rights are concerned, and in such cases are usually afforded legal recognition. An example may be seen in the case of a license by the owner of land, as, for instance, leave to another to hunt thereon.

The elements of a legal right may be expressed diagrammatically as follows:

Person { entitled { in whom the capacity of influence resides or inheres.
obliged { on whom the corresponding duty falls; toward whom the influence is directed; on whom it operates.

Object { material or corporeal
immaterial or incorporeal { with respect to which it exists and is exercised.

Fact { act
event { which determines its character or scope, gives rise to it, or with reference to which it exists.

In addition to natural rights and legal rights, political rights should also be distinguished. By political rights we

mean powers or capacities of taking an active part in the government, which the state concedes to or recognizes in certain classes of citizens. Ancient law did not distinguish legal from political rights. It allowed the former only to those who had the latter. In modern states we may say:

Natural rights belong to or reside in human beings.

Legal or civil rights belong to or reside in persons, natural (that is, human beings) or juristic (for example, municipalities, corporations).

Political rights belong to citizens or to those upon whom the state has conferred a partial citizenship.

As the three categories are not necessarily identical, it follows that possession of one form of rights does not imply possession of the others.

In modern times the law aims to accord civil or legal rights to all natural persons to the extent of their moral or natural rights. The tendency is also to extend political rights as widely as possible. Ancient law limited them and confused them. It conceded no legal rights to the foreigner; if the state gave him partial political rights, that fact gave him partial legal rights also. Today all human beings are persons, that is, subjects of at least some legal rights. Formerly this was not so.

Before turning to the rights recognized by our Anglo-American legal system, it may be well to consider briefly the general classes of rights which legal systems have recognized in the past, and which jurists usually consider to be natural rights which ought to be conferred or recognized by all systems of law. These may be summarized conveniently as five:

(1) The right to physical integrity, corresponding to the interest in body and life discussed above. This right may be deduced from the very idea of justice. For if the actions of one person are carried so far as directly to inflict physical injury upon another they obviously go beyond the limitation of his liberty by the like liberties of others; and if they inflict such injury indirectly, unless some interest

appears to countervail, the liberty of action conceded to the individual, except as limited by the like liberties of others, appears to be and ordinarily should be treated as exceeded. Such direct or indirect injury, therefore, is "unjust" and should be the subject of legal interference. All systems of law and all jurists agree in maintaining such a right of each individual to have his physical integrity respected by his fellows.

(2) The right to free motion and locomotion. This corresponds to the first and the fifth of the interests discussed above. Justice demands that each individual be at liberty to make free use of his limbs and to move about freely from place to place except as such conduct interferes with like action on the part of his fellowmen or comes in conflict with some obvious social or public interest. The Anglo-American legal system is especially jealous of any infringement or curtailment of this natural right.

(3) The right to the use of natural *media.* If one individual interferes with the relations of another to the physical environment upon which the latter's life depends, he infringes the like liberties of others by which his own are to be measured; he violates the interest in body and life to protect which the law is concerned chiefly in conferring or recognizing rights. Hence, in every system of law, some things are regarded as incapable of ownership. The Roman law put in this category air, running water, the sea, and the shores of the sea. With respect to bodies of water, legal systems do not agree entirely except in the case of the high seas. The high seas are now recognized universally as above and beyond the possibility of occupation or ownership by any state. With respect to air, our legal system regards pollution of the air by stenches, smoke, fumes, etc., as an injury to the private rights of property of land-owners whose lands are rendered less valuable thereby. But it recognizes also a social interest in pure air which is maintained by treating pollution thereof as a nuisance for which penalties may be exacted and which may be abated at suit

of public officers. There is a dispute whether land should be included among these natural *media*. But this is a controversy belonging to economics. Systems of law are agreed in recognizing ownership in land.

(4) The right of property. Authors are not wholly agreed whether there ought to be such a right. But one of the chief branches of positive law has to do with it; it is the basis of social and economic institutions in civilized states and is guaranteed in all American constitutions. In the immediate past, indeed, the law has been most fully developed and has been most effective in the direction of securing and maintaining private rights of property. At present a movement in another direction is becoming manifest. Jhering, the greatest jurist of recent times, states the difference between the old and the new in juristic thought thus: "Formerly high valuing of property, lower valuing of the person; now lower valuing of property, higher valuing of the person."

(5) The right of free belief and opinion. This is a modern development of the right of free motion and locomotion. It is in effect a right of free mental motion and locomotion, a right of exercising complete freedom in one's mental movements so far as like freedom on the part of others is not impaired thereby and except as some strong social or public interest may require limitations upon the mode of expression.

Turning now to the rights conferred or recognized by our legal system, we find that they fall into two well-marked classes. One class of rights exists generally against all persons; that is, corresponding to them are duties resting upon all persons not to infringe the interests they are intended to maintain. Such rights are called rights *in rem*. The other class of rights exists only as against one or more definite individuals. Such rights have corresponding to them duties of definite persons, who may be ascertained and named, to do or not to do particular things. They are called rights *in personam*.

SCHEME OF RIGHTS IN ANGLO-AMERICAN LAW

I. *In rem.*

(1) Personal integrity. The right not to be injured in body or mind by the acts or negligence of others. This extends to (i) life; (ii) body; (iii) health, (a) bodily, (b) mental. Originally the taking of life did not give rise to any civil liability. But modern legislation has given an action to the successors or the estate of the person killed.

(2) Personal liberty. The right of free motion and locomotion except as restricted by law and restrained lawfully by the proper officers acting in the proper manner.

(3) Society and control of family and dependents.

(4) Private property.

II. *In personam.*

(1) Contractual. Rights arising independently of pre-existing rights out of the agreement of the parties.

(2) Quasi-contractual. Rights to have restitution or compensation for a benefit conferred, imposed by law in order to prevent unjust enrichment of one party at the expense of another.

(3) Fiduciary. Rights to have a trust or confidence executed *in specie* (specifically). These rights are recognized only in courts of equity or in proceedings in equity.

(4) Delictual. Rights to compensation arising from violations of pre-existing rights *in rem,* commonly called torts.[6]

§ 7. Persons. By persons, in law, we mean those entities, natural or artificial, which the law clothes with the power of exercising a legal control over or influence upon the acts of others. Persons are of two classes, natural persons and juristic or artificial persons. In modern law,

[6] On the subject of rights, the zealous student may read with profit: Holland, Jurisprudence, chs. 7, 8; Markby, Elements of Law, §§ 146-158; Salmond, Jurisprudence, §§ 70-73; Korkunov, General Theory of Law, § 29; 1 Blackstone Comm. 129-140.

every human being is recognized as a natural person and hence as a legal person, since modern law allows a legal personality to every natural person. Juristic persons are aggregates of natural persons or of rights or even of objects, which for convenience in certain relations or for certain purposes, the law treats as subjects of legal rights and hence as persons. The most important form is the corporation which may be public—for example, municipalities, such as cities and towns, school districts, sanitary districts, drainage and irrigation districts—or private, including public service companies, such as railway companies, and ordinary business companies. Legal personality begins with birth and ends with death. It is true there is language to be found in the law books which seems to say that the unborn child in its mother's womb is capable of rights. For example, it is said that an unborn child may take by will or by inheritance. But what this means really is, not that the unborn child acquires rights, but that in such cases, where birth is expected, the right is reserved for the unborn child during the period of gestation. At common law, it was said that death was either natural or civil. Civil death took place where a person was entirely cut off from society by banishment or abjuration or by entering a monastery. In such cases, though alive in fact, he was treated legally as if dead. In a number of the United States there are statutes providing that persons adjudged to imprisonment for life shall be civilly dead. This complete loss of legal personality must be distinguished from mere incapacity. A person may have rights and yet be incapable of performing legally valid acts or incapable of incurring legal liability or incapable of incurring responsibility for what would otherwise be accounted violations of absolute duties. A person who is civilly dead has lost his legal identity; the old legal personality is extinct, and there is either a new one or none at all in its place. But a person whose legal personality is unaffected may have lost, or may not have attained, legal capacity to act in some or in all cases. Accordingly, we distinguish normal per-

sons, persons of full and complete capacity; and abnormal persons, persons of partial or limited capacity. Ancient law conceded full capacity to comparatively few. Modern law aims to confer full legal capacity as widely as possible, and in general to create legal incapacities only where there are natural incapacities also. The only substantial exception in our modern law is that for historical reasons married women are still under a partial legal incapacity in many jurisdictions. In such jurisdictions they have only a limited power of contracting. With this exception, the legal incapacities recognized in modern law coincide substantially with natural incapacities. In our Anglo-American legal system there are now five conditions which create legal incapacity, total or partial: (1) infancy or minority; (2) coverture, or the condition of being a married woman; (3) idiocy and lunacy, or insanity; (4) conviction of treason or felony; (5) alienage.[7]

§ 8. **Acts.** By "events" jurists mean those occurrences which take place independently of human will. By "acts" they mean those which are subject to the control of the human will and so flow therefrom. Acts, then, are exertions of the will manifested in the external world. Acts may have legal consequences because they interfere with interests (social, public, or private) recognized and protected by law, and so involve responsibility for breach of an absolute duty or liability for breach of a duty correlative to some right. In such case, we must ask, has the person in question capacity for responsibility or for liability. In general, our law holds one to liability for infringement of a private right where it would not hold him to responsibility for breach of an absolute duty, as in the case of an insane person, who may be held for a tort (infringement of a private right *in rem*) but not for a crime. Acts may also have legal consequences because such was the intention of

[7] On the subject of persons, reference may be made to Salmond, Jurisprudence, §§ 109-114; Korkunov, General Theory of Law, § 28; 1 Blackstone, Comm. 304, 442, 464; 4 Blackstone Comm. 380, 388; 2 Kent Comm. 53-63, 268-274.

the person or persons who performed them and the law recognizes and gives effect to that intention. Such acts are called legal transactions. They are performed in order to create rights, powers, or privileges, and when done by competent persons and in the prescribed manner, the law recognizes them and carries out the intent. Examples are: conveyances and transfers of rights; contracts; appointments of agents. In general, capacity for legal transactions is limited much more than capacity for responsibility. Thus, an infant over seven years of age may be responsible, and a minor over fourteen but less than twenty-one years of age will be responsible, if no other defect exists. But a minor has no power of entering into valid legal transactions.

Acts intended as legal transactions may be valid, that is, they may be such that the law gives them the effect intended, or they may be void or voidable. If void, they have no legal effect at all. If voidable, they have legal effect unless and until challenged, but they may be attacked for some defect, and, if so, they will fail to produce the intended legal consequences. Acts intended as legal transactions are void where not done in the manner which the law prescribes, or where they seek some end which the law refuses to recognize as legitimate, or where they involve injury to some interest, social or public, which the law regards as more important than the general interest in carrying out the intention of those who performed them. They are voidable chiefly where there is some defect in the capacity of the person who acted or where the intention, to which the law is asked to give effect is not formed freely or intelligently or under circumstances which make it fair to hold the party thereto. If one was forced or defrauded into a transaction, or entered into it by mistake, there is ground for attacking it as being voidable.[8]

[7] On the subject of persons, reference may be made to Salmond, Jurisprudence, ch. 8, subdiv. III; Salmond, Jurisprudence, §§ 220-275; Holland, Jurisprudence, §§ 134-149.

CHAPTER II

HISTORY OF THE COMMON LAW

§ 9. **Systems of Law.** There are two chief systems of law, the Roman or civil law and the English or common law. Roman law, beginning as the law of the city of Rome, became the law of the Roman Empire and thus of the ancient world, and eventually, by absorption or reception from the twelfth to the eighteenth century, the law of modern continental Europe. It is now the foundation or a principal ingredient of the law in continental Europe (including Turkey), Scotland, Central and South America, Quebec and Louisiana, and all French, Spanish, Portuguese, or Dutch colonies or countries settled by those peoples. The common law, Germanic in origin, was developed by the English courts from the thirteenth to the nineteenth century and has spread over the world with the English race. It now prevails in England and Ireland; the United States, except Louisiana, Porto Rico, and the Philippines; Canada, except Quebec; Australia; India, except Ceylon, and except over Hindus and Mohammedans as to inheritance and family law; and the principal British dominions and colonies, except in South Africa.

It should be borne in mind that the term "common law" is used commonly in four senses: (1) to distinguish the Anglo-American legal system from the Roman or civil law as a system; (2) to distinguish the law developed by judicial decision and expressed in the form of adjudicated cases from the law established by legislation and expressed in the form of statutes; (3) to distinguish the rules or principles recognized and acted on in the old superior courts of law in England and their analogues in America, from the rules and principles developed by and only recognized in

the old Court of Chancery in England and its analogues in America; (4) to distinguish the older course of judicial decision from new doctrines or principles which have come into our legal system in recent times through judicial decision or otherwise. In every case one must have recourse to the context in order to determine in which sense the term is employed. Here it is used in the first sense. Using the term for a moment in the second sense, the fundamental fact in American law may be said to be that the common law makes up the greater part in bulk of the law administered in all our jurisdictions, except Louisiana, furnishes by far the most important element of the law for the everyday administration of justice, and supplies the principles by which legislation is interpreted and applied and to a large extent the premises which legislation assumes and from which it proceeds. This fact, that one and the same body of principles and mode of legal thinking underlie the law and legislation of substantially all our jurisdictions is the chief agency in preventing a distinct law from arising in each State of the Union and in assuring commercial and social as well as political unity.

The history of the common-law system may be treated of conveniently under five heads: (1) English law before the Norman Conquest; (2) the development of the common law; (3) the development of equity; (4) the law merchant; (5) the legislative reform movement.

§ 10. English Law before the Norman Conquest. For practical purposes, the history of Anglo-American law begins after the Norman Conquest. Indeed for most practical purposes it begins in the thirteenth century. But as our law shows a continuous development from the Anglo-Saxon law, the legal historian must to some extent take account of the law before the Norman kings. With respect to Anglo-Saxon law, one fundamental point, characteristic of all archaic law, is to be noted at the outset, namely, that it existed for quite another purpose than that for which law exists today. The object of law today is to administer justice. The object of archaic law was much less ambitious.

It existed only to preserve the peace. Ancient law had to deal with the desire for vengeance; modern law has to deal with the desire for justice. Ancient law aimed to satisfy men's desire for revenge and so to restrain private war and preserve order. Modern law aims at satisfying the desire for justice. It suppresses revenge where ancient law bought off revenge. Hence the Anglo-Saxon laws consist largely of elaborate tariffs of composition for injuries, assessed, not in proportion to the injury done, but in proportion to the desire for vengeance likely to be awakened. Summarily stated, the characteristics of Anglo-Saxon law, which, for the most part are characteristic of all bodies of archaic law, are seven. (1) It was customary in origin and, when written, was a compilation of custom with casual amendments, mainly in the way of reconciling conflicting customs of different groups or localities. A primitive people cannot conceive that the national custom should change. When changes are demanded imperatively, as growth takes place, there is none the less a pretence that it has not changed. Novelties are backed up by attributing them to the great men of the past or are concealed by clumsy fictions. The idea of expressly changing the law or that such a course is possible, comes only after customary law has been reduced to writing and the political union of localities having different customs invites comparison and selection. Indeed Germanic peoples first got the notion that custom might be altered directly and expressly from contact with Romans and from the example of Roman legislation. (2) It was largely traditional and preserved in the memory. (3) It was formal to a high degree. This is the most striking and most universal characteristic of archaic law. But it is so at variance with our ordinary ideas of primitive simplicity that one asks at once why it should be so. The reason is threefold. In the first place, in primitive times men have but dim notions of the substance of rights. In archaic communities rights were something new which the nascent state was molding from tribal custom, religious ideas, and the exigencies of social existence. Men were not

clear as to what rights were. In fact, historically, rights are generalizations from the usual course of judicial interference in certain situations. In primitive times men did not generalize. Hence archaic law recognized only the forms by which custom had settled that the power of tribunals might be invoked. It did not perceive any abstract principle behind these forms. A second cause was the conservatism of archaic society. Law was growing up as a welcome substitute for private war and disorder. Its essence was that it was something regular, orderly, and certain. Hence, first of all, men were zealous that their legal institutions be stable. The form was fixed and all men might know it. Men's ideas might differ as to whether there was something more, called a substantial right, behind the form, and, if so, as to what it was. But the form allowed no scope for such disputes, and in an age when men were struggling toward peace and order, disputes over anything defeated the end of law. Innovation meant uncertainty and uncertainty meant disputes. But in such an age the law must be ready with an instant answer or the strong man thirsting for revenge will not be turned aside. A third reason is that there were no records. Everything had to be preserved in the memory of witnesses or of those who performed magisterial functions. It was, therefore, highly important to impress the memory of those who were to be charged with remembering the details of what took place. Forms and ceremonies were a stimulus to memory. (4) It had but feebly developed sanction or executive power. This was because the state as well as the law was more or less in embryo. Sanction in the modern sense is impossible without a strong and well-developed state. (5) It did not distinguish judicial from other functions. (6) It was very limited as to subject-matter, dealing mostly with violent wrongs to person and property and with family law. (7) The kindred was the unit, not the individual, as in modern law. There were no distinct judicial tribunals. Judicial along with other functions were performed by (a) the Witan, (b) the County Court, (c) the Hundred Court.

The Witan was the council of the great men of the realm called by the king to advise him. It is the ancestor of the House of Lords. The County Court was an assembly of the freemen of the county held twice yearly and presided over by the earl and the bishop. The Hundred Court was an assembly of the freemen of the hundred, held monthly. These were open-air meetings. There were no records. The freemen who made up the court kept the law and their judgments in their memories, although in later times, where title to land was involved, the freemen might allow a party to have the proceedings establishing his ownership recorded in a church.

§ 11. The Development of the Common Law. (a) *The King's Peace.* The rise and establishment of our Anglo-American common-law system is due to the administration of justice by the king's justices after the Norman Conquest. Had it not been for this, the crude law administered by the local tribunals of the Anglo-Saxon polity would no doubt have disappeared when the revived study of Roman law caused that legal system to be received and adopted in most of the countries of Europe in the fourteenth and fifteenth centuries. In Anglo-Saxon law the king did not administer justice in ordinary cases. But he might be appealed to where there had been a breach of his peace. This jurisdiction was availed of later to give the king's justices, who administered justice in his name, the power to deal substantially with every form of legal controversy.

In archaic society the regulative organization is not the state, a political organization, but the clan or some like body of kindred held together by the bond of blood relationship. The state grows gradually at the expense of these groups of kinsmen and finally supersedes them. In its contest with them in primitive societies, the state employed three means to extend its authority. The first was a restricting of the sphere of self-redress, requiring men in certain cases, instead of appealing to their kinsmen to aid them in righting their own wrongs, to appeal to the state for aid. The second was a differentiation of wrongs, setting off some

as peculiarly wrongs to the public and so proper to be taken over entirely by the state. The third was the recognition of certain truces or peaces, certain places or times or persons exempt from the feud so that neither the individual nor his kindred might do any violence without affront to the authority whose peace was disturbed. The king's peace was originally only one of these along with the peace of the church and the peace of public assemblies or places, such as the *gemot* or assembly of freemen, the market, the forest, the festivals, and the borough or walled town to which the people fled for safety in case of invasion. In its simplest form, the king's peace protected his person and the persons of his ministers and servants and forbade any prosecution of the feud or any violence in his presence, in his house or palace, or at the time of his coronation. Any violation of this peace was an affront to the king and he could be appealed to for redress. This circumstance, with the growth of royal power, led to gradual extension of the king's peace until it had absorbed the others and gone beyond them. The peace which belonged to the king's servants was extended to persons whom he took specially under his protection and thence to classes of persons so taken under his protection. The four great roads of the kingdom, which came down from Roman times had been in the king's peace. Thence it was extended to roads leading from the king's city or borough, to military roads, and at length to all roads throughout the kingdom. Finally it was regarded as extending to the whole realm so that any forcible or violent wrong was a breach of the king's peace and cognizable by his justices, and by a fictitious recital that a wrong had been committed with force, and thus in breach of the peace it became possible to appeal to the king's justice for every sort of wrong.

(b) *The King's Writ.* When the king was applied to for justice or desired to vindicate his authority, he issued his writ to the sheriff or some other suitable person directing what was to be done. In ancient times executive and judicial functions were not distinguished. The king's writ

was used for all purposes connected with the business of administration, the writs in judicial proceedings originally being in no way different from those in purely administrative affairs. Gradually a regular set of writs for judicial proceedings grew up, which in time became fixed in form and determined the scope and course of relief in the king's court.

(c) *The King's Court.* The king's court (*curia regis*) meant at first the place where the king resided attended by his chief officials and his household. The term so used takes us back to remote antiquity when the king transacted public business in the courtyard of his house. In this sense we still speak of being "received at court". In time it came to mean the center of administration where the business of government was carried on in all its branches, in the king's name, whether the king was actually there or not. In this sense we still speak of sending an ambassador to "the court of St. James". Finally, as a chief part of the king's work came to be judicial and came to be done in his name by justices appointed for the purpose, the term came to mean a place wherein justice is administered judicially. This latter soon became the most important sense of the term.

By the end of the reign of Henry II. the powers of the state were becoming well organized, and the king's court had established its law, that is the body of rules by which it decided cases, as a supreme law throughout England, to which all local customs must yield. Soon afterwards this great court began to split into departments, one having to do with breaches of the king's peace and so with crimes and wrongs of every sort; one with the recovery of land and with the recovery of debts, regarded originally as a recovery of property; and one with the royal revenue. The first class of causes were said to be heard before the king in person, and hence such causes for a long time followed him about, wherever the exigencies of war or politics might call him. The second were called "common pleas". The great statute of Magna Charta provided: "Common pleas shall not follow our court but shall be holden in some place cer-

tain." This set off a distinct court, which was held at Westminster. Convenience of administration required that the other departments also cease to be ambulatory and from the reign of Edward I., three superior courts of common law — the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer — were in existence, all sitting at Westminster. Originally these courts had each a definite and distinct jurisdiction. But in time each came to have substantially a complete common-law jurisdiction, the same as that of the other two, except that prerogative writs (for example, *mandamus* and *quo warranto*) issued only from the King's Bench and that court only had criminal jurisdiction; also the Exchequer had an equity jurisdiction which did not belong to either of the other two. A chief reason for this assimilation of jurisdiction was that the king's justices were paid in fees, as justices of the peace usually are in America today, and hence it was strongly to the interest of each court to acquire and exercise as wide a jurisdiction as possible. Accordingly, by a series of fictions each was able to bring within the letter of its own jurisdiction causes strictly within the cognizance of the others.

Appellate jurisdiction (exercised at common law only by writ of error and examination of the parchment record of the lower tribunal to ascertain whether error of law was to be found therein) was in the King's Bench, the Court of Exchequer Chamber, and the House of Lords. The King's Bench, representing in theory the king in person, who often sat therein prior to the reign of Henry III., and occasionally as late as Edward II., had jurisdiction to review the judgments of the Court of Common Pleas until that jurisdiction was given to the Court of Exchequer Chamber in the nineteenth century. Judgments of the Common Pleas and of the Exchequer were reviewed on writ of error by the Court of Exchequer Chamber, a court made up of all the judges of the three common-law courts. From this court and from the King's Bench until its appellate jurisdiction was taken away and review of its judgments confided to the Exchequer

Chamber, error might be prosecuted in the House of Lords, representing the king in Parliament. In 1875 through the Judicature Act of 1873, all of these courts except the House of Lords, as well as the Court of Chancery, the Court of Probate and Divorce, and the Admiralty courts were consolidated in one great court, called the Supreme Court of Judicature. This court is made up of two departments, the High Court of Justice, which is a court of first instance, and the Court of Appeal. The High Court sits in three divisions, known as the King's Bench Division, the Chancery Division, and the Probate, Divorce, and Admiralty Division. But all these are only divisions or departments of one court, thus giving to the judicial department a flexible, efficient organization.

In America, the tendency at first was to set up a court of common law, modeled upon the King's Bench, a court of equity modeled on the Court of Chancery, and probate courts, with a court of errors or court of appeals over all of them, sometimes on the analogy of the House of Lords, as in New York prior to 1848, sometimes like the Supreme Court of the United States, as an appellate court. The latter has become the usual practice in this country and many jurisdictions have gone further and provided intermediate appellate courts. Following the Federal Judiciary Act of 1789, it has become usual in this country to give to one court or to one set of courts of first instance all the jurisdiction of the old common law courts and also equity jurisdiction. But five States now preserve separate courts of equity.

(d) *The Custom of the Realm.* The local courts of the Anglo-Saxon period and of the earlier period after the Conquest administered a local customary law that varied in different parts of the country since the kingdom was made up by the consolidation or absorption of a number of kingdoms originally distinct. When the king's courts came to administer justice for and over the whole kingdom, naturally they purported to administer a general customary law — the custom of the whole kingdom, or the common law

of England. This term "common law" was in use already to designate the general law of the universal church, as distinguished from particular laws of particular provinces and jurisdictions. But there was in fact no body of custom common to all England. Hence, in fact, the common law is a body of customary modes of decision and not a body of customary rules of popular action. As cases arose the judges determined what the custom should be, and their decisions, followed in other like cases, became the common custom of the realm because convenience demanded that there be one rule for the whole kingdom and because the superiority of the king's courts over the local tribunals in respect of procedure, learning, power to enforce their orders, and general efficiency made every one desire to obtain the king's justice whenever he could.

(e) *Precedents and Case Law.* After the downfall of the Roman Empire in the west of Europe, justice was administered by local tribunals which applied a local customary law as we have seen was the case in England at the Norman Conquest. In the twelfth century the study of Roman law was revived in the Italian universities, and from the universities Roman law spread to the courts partly because new conditions required a general law to supersede a confused mass of divergent local customs, partly because the setting up of courts of general appellate jurisdiction in which sat judges trained in Roman law in the universities gradually compelled the lower tribunals to learn and learn to apply that system. Accordingly, Roman law replaced the local customary law to a greater or less extent everywhere in Europe except in England. England, because of the Norman Conquest, got a strong central tribunal with general jurisdiction before other countries. When this tribunal or, as it soon became, this set of tribunals, was established, the reception of Roman law elsewhere had not gone far enough to impose that system upon England; and later, when Roman law had been received elsewhere, England had a body of general law of her own, strong enough to with-

stand any Roman invasion. This was achieved through the practice of courts in following their past decisions in like cases and in looking to their past decisions for the principles to be applied as new situations called for decision and for analogies to be used in developing the law. Elsewhere, Roman law came to perform these functions. In England, the courts, called upon to administer a non-existent common law of England, made such a law through regarding their past decisions as not merely decisions of the particular causes before the court, but as solemn ascertainments of the law as well.

As early as 1304 this doctrine of the authority of past decisions was so well understood that we find counsel in argument reminding the court that its decision upon the admissibility of a plea will be an authority in every like case in England. A few years later we meet with abundant references to prior decisions by the justices in rendering judgment and by the fifteenth century court and counsel may be seen citing reported decisions exactly as is done today. At first, reference is made only to the fact that a case involving such and such a question was decided in this way or that. Later, reference was made to the judgment rolls which showed what the issues were and how they were determined. In the reign of Henry III., Bracton, a justice of the Common Pleas, kept a notebook of the judgments rendered, which has come down to us as our earliest collection of precedents. Soon, however, lawyers began to take down in court the arguments of counsel and the reasons given by the judges for their decisions and we have a substantially unbroken line of these reports from the reign of Edward I. to the present. The notes so taken in court, in Norman or law-French, from Edward I. to Henry VIII., are called Year Books, and used to be regarded, probably upon insufficient evidence, as in some sort official reports. In the time of Henry VIII., Year Books came to an end and in their place we have notes of cases taken in court by eminent lawyers and published under their names, often

after their death. In the eighteenth century reporting decisions became a regular business of certain members of the bar, who devoted themselves to it, and there came to be a recognized series of reports for each court. Finally in 1865, the bar took the matter in hand and since that time reporting in England has been in charge of a council of law reporting elected by the members of the legal profession. In America, the first reports are notes taken in court by eminent lawyers, published by them or by others after their death. But the state soon took the matter in hand and in the case of all our courts of appellate jurisdiction, except the Federal Circuit Courts of Appeals, there are official reporters who are public officials, whose duty it is to report judicial decisions for the information of the public.

In this doctrine of the authoritative force of judicial precedents, we have perhaps the most characteristic feature of the Anglo-American legal system. This doctrine is quite unknown to other legal systems. In continental Europe, a judicial decision binds only in the case in which it is rendered. Outside of that case, even in the same court, it has no more force than its intrinsic reasonableness and conformity to law give to it. It is true that greater weight is coming to be given to judicial decisions on the Continent in recent times. Yet even so they are looked upon much as in our law we look upon the discussions in textbooks. Binding authority is not conceded to them. On the other hand, in England and in America, a point of law solemnly decided has become a part of the law quite as much as if established by legislation, and is held to bind the judges in other cases like it and to bind them to apply its principle where analogy must be resorted to. Hence our case law is not based simply upon the psychological law of association. It is not simply that the judges, having done a thing once do it again from association of ideas and then many times from force of habit. It is based rather upon the conception that our courts must decide every case upon principles of the common law, unless a statute governs,

and hence must first ascertain and announce the principle or rule of the common law which is applicable. When this rule or principle is thus ascertained by those who alone have the power to do so, it binds the court and all courts inferior thereto, and is a persuasive authority of more or less weight, depending upon the standing of the court and the cogency of its reasoning, in all other common-law jurisdictions. Accordingly, American courts may be found citing recent English decisions, Canadian decisions, Australian decisions, and even decisions of the British courts in India, and *vice versâ*.

Much ignorant declamation has been directed against this doctrine of the binding force of judicial decisions by those who have not studied our legal system and have not learned from experience the nature of the problems which a legal system has to meet. In the systems of law which have no such doctrine, the Roman law furnishes a great substratum of principles and doctrines upon which court and jurist may always fall back. With us, our body of case law performs this function. In upwards of ten thousand volumes of reported decisions our magistrates have before them the experience of all common-law tribunals in the decisions of actual controversies of almost every conceivable kind. They may see exactly how every rule or principle they are called upon to apply has resulted in its practical application in the past. They need take no step in the dark. Much legislation is in the nature of experiment, and today many acts fail for every one that accomplishes its purpose. On the other hand, the persistence and vitality of our judge-made common law in every part of the world is a tribute to the theory that brings to bear upon each case all the judicial experience of the past. Moreover, the knowledge that causes will be decided in the light of the judicial decisions of like causes in the past, enables the diligent lawyer to set before himself the exact materials from which the court will reach its decision, to know exactly how the court will reason with respect to

them, and to advise his client with confidence. No amount of legislative detail or precision can compare with this in producing certainty in the administration of justice.[1]

(f) *The Jury.* One of the chief factors in turning the ordinary course of litigation from the local courts into the king's courts and thus in establishing our common-law system was the great superiority of the mode of trial employed therein. Since the chief aim and purpose of archaic law is merely to keep the peace, and since discussion or argument would tend to provoke rather than to prevent violence, primitive law resorts to crude mechanical devices in order to determine the issues upon which decision must depend. In the primitive Germanic law, every cause was divided into two stages, called the issue term and the trial term. At the issue term, the parties stated their contentions in a highly formal and technical fashion as a result of which and of the application of certain highly formal rules, it was determined whether there was anything to try, if so, what it was and how it should be tried. These proceedings having determined what the issue was and the mode of trial to be resorted to, the prescribed trial was had at the trial term. This mode of trial was never in the form of an investigation of the facts. It was an arbitrary mechanical device, usually predicated upon the idea of obtaining the judgment of God by resort to some test or ordeal. Accordingly in the old English law, trial might be by compurgation, by witnesses, by charters, by record, by ordeal, or by battle. In trial by compurgation, the party adjudged so to prove the issue brought forward a specified number of persons of a certain rank, who made oath in his favor, not to the fact in issue, but to the credibility of the party and the truth of the oath as to that fact which the party himself took. In trial by witnesses, the party adjudged to make proof in this way brought forward a specified number of

[1] On this subject the student may read profitably: Pollock, Essays in Jurisprudence and Ethics 237-261; Markby, Elements of Law, §§ 95-99; Austin, Jurisprudence, Lecs. 38, 39 pt. I; Dillon, Laws and Jurisprudence of England and America, 229-253.

witnesses who testified, without examination or cross-examination, in the very words of the issue as framed at the issue term. In trial by charter or by record, the party adjudged to make the proof produced the charter or record to the justices at the trial term for their inspection. Trial by ordeal took place by cold water, hot water, hot iron, or the morsel. Each was preceded by a solemn religious ceremonial in which the party was adjured not to undergo the ordeal unless in the right, and Heaven was invoked to decide the dispute. In the ordeal by cold water, the party was cast into the water, which was asked to cast him forth if guilty, but receive him if innocent. If he sank, there was judgment in his favor. In the ordeal by hot water, the party plunged his arm into a vessel of hot water and brought forth a stone. His arm was then bandaged for three days. If at the end of that time his arm had healed, there was judgment in his favor. If it had festered, there was judgment against him. In the ordeal by hot iron, the party was required to carry a hot iron for nine feet, when his hand was bandaged and the result determined as in the ordeal by hot water. In the ordeal of the morsel, the party was required to swallow a bit of bread or cheese weighing an ounce. If he did so without serious difficulty, he had judgment; if he choked, there was judgment against him. In trial by battle, the parties, or if they were infirm or incapable of battle because of age or sex, their champions, that is kinsmen or other appropriate persons who knew the case, fought with staves in a ring before the justices from dawn till the stars appeared or one of them yielded. If one were vanquished, or if the party having the burden of the issue did not prevail in the time fixed, there was judgment against him. Trial by battle was brought into England by the Normans.

To these crude, archaic modes of trial, the king's courts added trial by jury which soon became the normal mode of trial and developed gradually into a rational method of ascertaining disputed questions of fact. The jury had its origin in the inquisition or inquest, an administrative pro-

ceeding employed by the Frankish kings in matters of revenue and borrowed by them from a similar practice of Roman governors of provinces. This institution was very like the appraisers summoned by a sheriff on a sale or extent of lands or in condemnation proceedings — institutions which still show the jury in its older form. The Frankish king, desiring to know the revenue which a locality should pay, sent for certain citizens thereof and required them to state the facts under oath. This institution was borrowed by the Norman dukes and was brought into England at the Conquest. At first it was used for all purposes for which the king might require to know facts within the knowledge of the freemen of a particular locality. But the legal genius of Henry II., to whom English law owes more than to any other ruler, made it into a judicial institution. In its earliest form, trial by jury was a mechanical mode of trial. The jurors stated in their verdict what they knew, not from evidence heard, but from personal knowledge and the repute of the neighborhood. But by a gradual course of evolution extending over several centuries, the jurors ceased to be witnesses and became purely triers, so that the only vestige of their original character is to be found in the requirement that they come from the vicinage. This evolution was not complete until the seventeenth century, and legal control over the verdict, so that the jury could be confined to the issue of fact and prevented from invading the province of the law, that is, from deciding individual causes capriciously in the teeth of the general rules established for all cases, was not achieved fully until the nineteenth century and for criminal cases has not yet been achieved completely. But, expensive and dilatory as this mode of trial is today, and capricious and unsatisfactory as its results are at times or in certain classes of cases, it was the first thoroughly rational mode of trial to develop in the modern world and has developed features, such as the oral examination and cross-examination of witnesses before the court, which are of inestimable value in the administration of justice. Next to our common-law

doctrine of precedent, it has made our legal system what it is.

(g) *The Supremacy of Law.* The common law carries the idea of equality before the law and of the universal subjection of all persons and classes of persons to one law administered in the ordinary courts of justice to its furthest limit. Every public official is under the same liability, enforced in the same courts, for acts done without legal justification as any other person. If a public officer exceeds his authority and in so doing does injury to another, his wrong is looked upon the same as a wrong committed by any one else and is dealt with by an ordinary action in the ordinary courts. In America, where written constitutions are universal, the ordinary courts in ordinary causes between private litigants, may be called on to judge of the validity of legislative acts and to determine whether they go beyond legislative authority or transgress constitutional limitations thereon, and consequently whether they are to be recognized as legally valid. It was a fundamental notion of Germanic law that even the state was bound by law. Law was thought of as something superior and anterior to the state. Consequently the limitations on royal action in Magna Charta were taken to be declaratory of the fundamental legal principles by which even the crown must be governed. As Bracton put it in the thirteenth century, the king rules under God and the law. As early as the fourteenth century, accordingly, we find the court of King's Bench allowing cattle taken for taxes to be replevied from the king's collector of taxes because the latter had no warrant, and refusing to recognize the king's letters addressed to the sheriff directing him not to proceed against an outlaw, because the king could pardon only under the great seal and his letter should be produced to the court, which alone could order the sheriff not to proceed under the warrant in his hands. In the seventeenth century this doctrine led to a serious controversy between the common-law courts and the Stuart kings, as a result whereof the power of the courts to judge of the legality of executive acts became

thoroughly established. Indeed the great common-law lawyers of that period claimed a like power with respect to the validity of legislative acts. But it was not exercised in England, and as a result of the English revolution of 1688, it became settled that no such power exists. In America, however, where courts had been required to pass upon the validity of colonial legislation with respect to colonial charters, the idea was familiar at the time our constitutions were adopted, and for that and other reasons passed into our constitutional law.

This doctrine is peculiarly a doctrine of Anglo-American law. In Roman-law countries, the legislature is the sole judge of the validity of its own acts, and executive or administrative acts are examined into only in special administrative tribunals. The establishment of the doctrine of the supremacy of law was the last achievement of the common law as a system administered in the king's courts of law. With the establishment thereof in the seventeenth century, the development of that system culminates. Thenceforth new agencies come into play to give flexibility and liberality to this system of judge-made rules, to modernize it, and to make it into the legal system of modern England and of America. The chief of these agencies are: (1) the Court of Chancery and development of equity therein; (2) the Law Merchant; (3) the Legislative Reform Movement of the nineteenth century.[2]

§ 12. The Development of Equity. As the system of law administered in the common-law courts developed, as happens with all systems, it began to be too rigid at many points to be effective as an instrument of justice. One of the effects of system, in all things, is to petrify the thing systematized. Moreover, the demand for uniformity and certainty in law makes legal systems peculiarly subject to this rigidifying process. In legal history we find three

[2] On the history of the common law the student may consult with advantage Pollock and Maitland, History of English Law (to the reign of Edward I. only), 2 vols.; Holdsworth, History of English Law, 3 vols.; Select Essays in Anglo-American Legal History, 3 vols.

agencies constantly at work to correct this difficulty and to restore to the legal system the needful elements of flexibility and liberality. These are fictions, equity, and legislation. Fictions are a crude device belonging to archaic law whereby the form of the law is preserved while the substance is changed, thus creating an appearance of conformity to old rules which in fact are no longer applied. This agency can be effective only with respect to details and operates chiefly in procedure. It is wholly out of place in modern law. By equity the legal historian means, in the words of Sir Henry Maine, "any body of rules existing by the side of the original civil law, founded on distinct principles, and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those rules". Such a body of rules arose in Roman law as in English law and in each was the chief liberalizing and modernizing agency in the development of a legal system suited to be a law of the world. Used in the foregoing sense, the term equity in truth covers up a general fiction, more audacious and of wider scope than the particular fictions above referred to, but essentially of the same character. Theoretically and nominally the old law, the old rules, remain in full force, unimpaired. No one has authority to alter them, least of all those who administer equity. But alongside the strict law a new set of rules or a set of appendixes to and glosses upon the former are developed which in effect entirely alter the practical administration of justice. In modern times, needed changes are made expressly and directly by legislation. But at an earlier time, when legislation was rare and feeble, an age that had got beyond the point when ordinary fictions would do the work required, found relief in this idea of a system of equity administered alongside of and supplementary to the law which remained untouched.

In our common-law legal system four defects developed, as the system began to reach its final form, which called for correction by such a collateral body of rules. These were (1) the formal character of the rules as to property in land

which made gross frauds and breaches of trust possible, since the court of law recognized only the holder of the formal legal title; (2) the rigidity of the system of writs and actions, which could be developed only within narrow lines and left many urgent situations unprovided for; (3) the unsuitability of the common-law mode of trial, that is, trial by jury, to many classes of cases in which a court must supervise continuous acts, superintend the administration of trusts and control the action of fiduciaries, exercise a visitorial jurisdiction over charities, adjust controversies between numerous parties, investigate complicated accounts, and the like; and (4), the lack of power in the common-law courts, except in the case of prerogative writs addressed to public officers, to command the doing of a legal duty specifically or the not doing of some act in violation of a legal right and of power to enforce such command. The common law acted and courts of law act by judgments that a plaintiff have and recover money damages or have and recover possession of property to which he has a legal right of immediate possession. But it happens often that money damages are wholly conjectural or that the subject in dispute is so unique that money offers no fair equivalent. In such cases only a command addressed to the person of the defendant requiring him to perform his duty specifically will protect the admitted right of the plaintiff and secure justice.

In the old Germanic law "the king exercised a jurisdiction based on broader principles of right and justice than that of the ordinary tribunals; he was not in a like degree bound down to the formality of the law and could decide the case before his court according to the principles of equity". In the Anglo-Saxon law there is an express provision, "If the law be too heavy, let him seek a mitigation of it from the king". Indeed in England the king had a power of dispensing with the operation of acts of Parliament in particular cases for particular reasons of hardship or policy down to the revolution of 1688. The same power, as a power to dispense with the operation of common-law rules in particu-

lar cases for special reasons of hardship or inadequacy of the law, is the parent of the Court of Chancery and hence of our system of equity. After the ordinary judicial powers of the king had been taken over entirely by the king's justices and thence by the king's courts of law, this residuary power to do justice in special cases, according to the special circumstances of those cases, remained. This power could not be invoked as a matter of right, but was exercised in the king's discretion as a matter of grace. At first, applications for exercise of this power were made to the king, or to the king's council, or to Parliament. But usually they came to be made to the chancellor who, as "keeper of the king's conscience", was, as it were, his secretary for judicial matters, and an ordinance of Edward III. required them to be made ordinarily to that officer. Thus the chancellor succeeded to this extraordinary or residual jurisdiction of the king, just as the justices had succeeded to his ordinary jurisdiction, and a court of chancery arose, just as courts of common law had arisen.

The earlier exercises of this jurisdiction by the chancellor were governed by no system and were largely arbitrary. As late as the reign of Henry V., we find a suitor applying for relief on the ground that he was an old soldier who served the king in his wars in France and was wounded in the service and that he was injured in the service of the king's sister-in-law, and seemingly regarding these matters in his bill (petition for relief) as quite as important as the facts of his case. In consequence there was naturally great jealousy of this indefinite and unsystematic interference with the ordinary course of justice, and Parliament legislated against it some ten times between 1390 and 1453. But some such jurisdiction was required urgently, if the courts were to do justice, and a succession of great chancellors, by adopting the common-law doctrine of binding precedents, worked out a system of equity as well settled and uniform as the system of common law, differing only in a greater latitude of application to individual cases made possible by a doctrine that fixed principles were always

to be applied in view of the circumstances of the case in hand. This development of a system of equity was not complete until the nineteenth century and in consequence a part of it took place in this country, particularly through the decisions of Chancellor Kent in New York.[3]

§ 13. The Law Merchant. In the seventeenth century, commercial causes began to come before the common-law courts in considerable number, but it was not until the eighteenth century that the need of a body of law for such causes came to be felt acutely. There were no precedents and legislation was feeble. Hence the courts applied to mercantile cases the custom of merchants, ascertained by the evidence of merchants—that is, by expert evidence—as a fact in every particular controversy. The custom of merchants so ascertained was a general body of commercial usage observed by merchants throughout western Europe. For the merchant of the Middle Ages was in a class by himself; the ordinary law was not applied between merchant and merchant, but, as he was usually itinerant and a foreigner, special tribunals existed to determine his controversies. In the eighteenth century, however, the growth of trade and commerce rendered continuance of such a condition of commercial law impossible. Accordingly, the judges, as usual, had recourse to the common-law doctrine of binding precedent. They held that it was for the court to determine what was the custom of merchants, and having so determined on any point, the court's decision became a precedent to be followed in like cases and to be developed by analogy. Thus the custom of merchants was converted into a custom of judicial decision in mercantile causes, founded, however, upon the former in that the courts had become familiar therewith and embodied its chief features in the new judicial law merchant. This development also was incomplete in England at the Revolution and a part of it took place in America in the nineteenth century. The chief subjects

[3] On the history of equity, the student should read Kerly, History of Equity.

which represent the law merchant in our law today are negotiable instruments and insurance.

§ 14. The Legislative Reform Movement. The legislative reform movement, which completed the modernization of the common-law legal system, begun by the court of chancery and carried on by the law merchant, may be said roughly to cover the period from 1776 to 1875. It may be regarded as beginning with 1776 for two reasons. In the first place, Jeremy Bentham (1748-1835) the chief English law reformer, to whose exertions the movement was in large part due, published his first book in that year. Secondly, in the same year the American Declaration of Independence set free a new group of legislatures to take a hand in the renovation of the law. The end of the period is not fixed so easily. But the taking effect, in 1875, of the English Judicature Act of 1873 coincides roughly with a change in the character of legislation on purely legal matters in the United States. Although legislation is still active in all common-law jurisdictions, it ceased to be directed to sweeping and far-reaching changes. The tendency became one to codify and restate rather than to alter. More recently the demand for social legislation has begun to produce statutes making profound changes in common-law rules and doctrines. This tendency no doubt heralds a new period, but has not progressed far enough to enable us to say more.[4]

[4] Details of what was achieved in this legislative reform movement will be found in connection with the several topics of the law and have no place here. But the student may consult with profit two anniversary publications in which the details are developed: A Century of Law Reform (English) and Two Centuries' Growth of American Law.

CHAPTER III

THE COMMON LAW IN AMERICA

§ 15. Sources and Forms of Law. By the term "sources of law" we refer to the methods and agencies by which rules of law are formulated; by "forms of law" we refer to the modes in which the rules are expressed—the literary shapes they assume. Laws derive their authority from the state, but only a small part of the rules which make up a body of law are formulated by the state directly. The formulating agencies of law, the sources whence the state derives the rules to which it gives authority, are six. They are: (1) Usage. The legislature or, as in the case of the law merchant, the courts may take up a matter of usage and make it law. (2) Religion. This was a formulating agency of the first importance in ancient law. In modern law, the broad principles and fundamental everyday conceptions with which religion has to do have long been settled, and hence this source is no longer active. (3) Adjudication. In our legal system adjudged cases are a form of law. But in any system adjudication formulates rules which get authority in another form. For instance, the rules given legislative authority in recent codifications of various branches of commercial law were all or nearly all formulated by judicial decision. (4) Scientific discussion by commentators and text-writers. As legal systems reach maturity the importance of criticism of legal rules by jurists increases greatly and the writings of teachers and scientific expositors of the law come to be an active agent in reformulating old rules and in formulating new ones. Such writings in our legal system have no direct or intrinsic authority. But, so far as the criticisms are well taken, the deductions in accord with sound legal reason and the new

propositions furnish adequate solutions of pressing problems, they commend themselves to courts or legislatures, and the needed authority is conferred. (5) The general moral sense of the community. (The rôle of morality as a formulating agency was considered above in connection with the relation of law and morals.) (6) Legislation, that is, principles formulated immediately and directly by the law-maker.

In the common-law system, there are three forms of law:

(1) Legislation, under which, using the term in its wider sense, we have in America three varieties: Constitutions; Federal treaties; Federal and State statutes.
(2) Judicial decisions. The decisions of the superior courts in England and their analogues in other common-law jurisdictions.
(3) Books of authority.

With respect to judicial decisions as forms of law, a few observations are necessary. In the first place all tribunals inferior to and whose decisions are subject to review by a court of appellate jurisdiction which has decided a point of law are bound absolutely by the decision. They have the duty of applying the point to all cases involving it, whether they approve or not. The court itself will also follow the decision and will apply its principle by analogy in other cases as a general rule. Yet if it has been decided but once and the court feels the decision, as Blackstone puts it, is "flatly absurd and unjust", it will, although cautiously, overrule the prior decision of the point. Some courts in extreme cases will so overrule a line of prior decisions. But as a rule, when a question has been decided often in a certain way and has thus become settled by repeated decisions, courts will leave it to the legislature to make a change. If the decision lays down a rule of property, the courts will not overrule it, since vested property rights might be interfered with thereby. If it has to do with a rule of commercial law, where uniformity with other States is often as important as a uniform course of decision within the State, a prior wrong decision will be overruled more readily. If

it has to do simply with a matter of procedure, the courts are even more free to change their view, since the substance of rights will not be disturbed. In jurisdictions other than the one in which the decision was rendered or in courts of co-ordinate authority, it is said to be "persuasive" but not controlling. It must commend itself to the court in which it is cited as correct in reasoning and in accord with the principles of the common law. But usually, if only for the sake of certainty, a well-considered decision will be followed elsewhere. If there is a long and settled line of adjudications in co-ordinate jurisdictions to a certain effect, a court in which the question arises for the first time will feel bound to yield its personal judgment thereto unless in an extreme case, for such a line of decisions may be taken to show the common law. Yet there may be good reason for reaching an independent conclusion in such a case, and hence courts often differ so that there come to be two or more divergent lines of authority on many subjects. In passing upon the weight to be given to a decision as an authority, regard must be had more to what the court *did* than to what it *said*. What a court may say on matter not before it for decision and not involved in the decision is called *dictum* (strictly *obiter dictum*). *Dicta* have no weight except such as comes from their intrinsic reasonableness or from the eminence of the judges who deliver them. But the reasoning of the court which decided a question is of great value in enabling the lawyer to understand what was up for decision and how and why it was dealt with as it was. Moreover, where a point material to the disposition of a cause was argued and decided, what the court said upon the point does not become *dictum* even though the case might have been or was decided in the same way upon another point. Yet such a situation may weaken the authority of the case upon the point for which it is cited.[1]

There are very few books of authority in our legal system, that is, textbooks, commentaries, or juristic discussions,

[1] On these matters the student will do well to consult Wambaugh, The Study of Cases.

which have the authority of law in and of themselves. In other systems of law such books are often numerous and of the greatest weight. With us, as a general rule, such a book has no authority of itself, and is regarded only to the extent that it expounds accurately the judicial decisions which it cites and deduces correctly the principles of law to be derived from such decisions. Yet we have a few books which are truly books of authority. First of these is a treatise on tenures by Sir Thomas Littleton, a justice of the Court of Common Pleas in the reign of Edward IV. This book is of absolute authority on questions of the law of real property. Like authority on questions of common law belongs to the writings of Sir Edward Coke, usually called Lord Coke, who was attorney-general under Elizabeth and lord chief justice under James I. His commentary upon Littleton (usually cited as "Co. Litt.") especially is regarded as an authoritative statement of the common law of the classical period in which he practiced, judged, and wrote.

§ 16. Forms of the Common Law in America. When settlers go into a new country which is without law, they carry their own law with them. Thus the common-law system became established in British America. Moreover, it is a settled principle that when political sovereignty is changed, the law, nevertheless, remains unchanged and can only be altered by the legislative adoption or judicial reception of some other system. Hence the throwing off of British sovereignty at the Revolution left the English law in force in the United States, just as Spanish law is now in force in Porto Rico and in the Philippines. But there was no desire on the part of the colonists, in declaring their independence of British sovereignty, to throw off English law. On the contrary, in the Declaration of Rights of the Continental Congress, in 1774, they solemnly declared, among other things, as the "rights and liberties" of Americans:

"That the respective colonies are entitled to the common law of England, and more especially to the great and ines-

timable privilege of being tried by their peers of the vicinage according to the course of that law.

"That they are entitled to the benefit of such of the English statutes as existed at the time of their colonization; and which they have by experience respectively found to be applicable to their several local and other circumstances."

Accordingly, most of our States provide by statute that the common law of England shall be the rule of decision in their courts, so far as applicable, except in so far as cases are governed by constitutions or statutes. And in the absence of legislation, this is the rule except in Louisiana, where the French law is the basis of the legal system. The bulk of this American common law is made up of the decisions of the English courts. But here a question arises how far such decisions are binding authorities and how far persuasive only. Many statutes provide expressly that decisions prior to colonization, that is, prior to the reign of James I., shall be authoritative, so that subsequent English decisions are only persuasive as to what is the common law. In some the decisive point is fixed at the Revolution, and hence English decisions prior to the Revolution have binding force. In others, particularly western States where the statutory adoption of the common law is relatively recent, it is held that the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution in case the courts consider subsequent decisions, either in England or America, better expositions of the general principles of the Anglo-American legal system.

With the foregoing qualifications, the first element in our American common law is the decisions of the old English common-law courts. To be part of our common law, however, these decisions, or rather the rules and principles which they establish, must be applicable to the social, political, economic, and physical conditions in America—or rather must have been applicable at the time the courts were called upon to determine whether they had been received into our common law. For if they were applicable and were received and adopted as such, subsequent changes

in conditions whereby a change becomes expedient, call for legislative rather than judicial alteration of the established law. The second element is the body of American judicial decisions since the Revolution. The third element is the body of decisions in England and other common-law countries since the Revolution. These, of course, have only persuasive authority. But they have played a very large, often a controlling part in the development of our law on account of the high character of the courts that rendered them and the sound reasoning and practical justice involved in them. The fourth element, the Law Merchant, not fully incorporated into the common law in England at the time of the Revolution, was to some extent absorbed and developed simultaneously in the two countries. The fifth element is the canon law, so far as it was received in the English ecclesiastical courts, which had jurisdiction over probate and divorce, and in the form of traditions of practice and of decisions of the ecclesiastical courts in probate and divorce causes entered into our law. As a sixth, we may name international law. A large part of international law is a common element in the laws of all civilized nations. Most of the rules of international law which are recognized as part of our legal system are now expressed in the form of judicial decision. But in this part of the law learned treatises have a much greater authority than we concede ordinarily to the text-writer. Finally, we must name English statutes, so far as applicable to conditions in America, in furtherance, development, or amendment of the common law. All such statutes prior to colonization are a part of our law. But as the colonies had their own legislatures and all English statutes after colonization were not made for America, English statutes after colonization and prior to the Revolution may or may not be a part of our common law, according as they were or were not received in America as such. There are not many of these statutes, and in the exposition of each special subject hereafter those which we have received will be taken up and treated.

Such are the elements of which our Anglo-American legal

system is composed. But the living principle in all of them is reason. The key to our system is the power of legal reasoning. What the student of the law must learn above all else is to think and reason as a common-law lawyer. If he acquires this power, he knows the common law. Mere memorizing of detailed rules will do little for him without it. For, says Lord Coke:

"Reason is the life of the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience and not of every man's naturall reason."